85-1210

No._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

Supreme Court, U.S.
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NORBERTO LUIS SANTIESTEBAN
Petitioner,
vs.
STATE OF NEW MEXICO
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW MEXICO

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QUESTION PRESENTED FOR REVIEW

WHETHER Petitioner's consent to search his vehicle, obtained as the immediate and direct result of an unlawful stop and detention, automatically validated an otherwise unconstitutional search, where absolutely no intervening facts or circumstances existed to purge the taint of illegality.

TABLE OF CONTENTS

Question Presented for Review i
Table of Contents ii
Table of Authorities iii
Opinions Below 1
Jurisdiction 1
Constitutional Provisions and Statutes Involved 2
Statement of the Case 3
Argument for Allowance of Writ 6
THE STATE COURT'S HOLDING THAT CONSENT ALONE AUTOMATICALLY VALIDATES AN OTHERWISE UNCONSTITUTIONAL SEARCH IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS AND SHOULD BE REVIEWED TO RESOLVE THE CONFLICT.
Conclusion 10
Appendix A-1

TABLE OF AUTHORITIES

U.S.SUPREME COURT:

Brown v. Illinois, 422 U.S. 590 (1975) 6, 7, 8
Bumper v. North Carolina, 391 U.S. 543 (1968) 9
Davis v. Mississippi, 394 U.S. 721 (1969) 7
Dunaway v. New York, 442 U.S. 200 (1979) 7, 8
Florida v. Royer, 460 U.S. 491 (1983) 7, 8, 9
Hayes v. Florida, U.S. , 103 S.Ct. 1643 (1985) 7
Taylor v. Alabama, 457 U.S. 687 (1982) 7, 8
U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975) 7
U.S. v. Mendenhall, 446 U.S. 544 (1980) 9
Wong Sun v. U.S., 371 U.S. 471 (1963) 6, 7

FEDERAL COURTS OF APPEAL:

U.S. v. Abbot, 546 F.2d 883, 885 (10th Cir.), cert. den. 430 U.S. 966 (1977) 9
U.S. v. Berry, 670 F.2d 583 (5th Cir. 1982) 7
U.S. v. Cherry, 759 F.2d 1196 (5th Cir. 1985) 8
U.S. v. Gonzalez, 763 F.2d 1127 (10th Cir. 1985) 8
U.S. v. Gooding, 695 F.2d 78 (4th Cir. 1982) 8
U.S. v. Melendez-Gonzalez, 727 F.2d 407 (5th Cir. 1984) 8
U.S. v. Moreno, 742 F.2d 532 (9th Cir. 1984) 8
U.S. v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979) 8
U.S. v. Recalde, 761 F.2d 1448 (10th Cir. 1985) 8
U.S. v. Robinson, 690 F.2d 869 (11th Cir. 1982), prev. op. at 625 F.2d 1211 (5th Cir. 1980) 7, 8
U.S. v. Sanchez-Jaramillo, 637 F.2d 1094 (7th Cir. 1980) 8
U.S. v. Thompson, 712 F.2d 1356 (11th Cir. 1983) 8
U.S. v. Waksal, 709 F.2d 653 (11th Cir. 1983) 8

CONSTITUTIONAL PROVISIONS

Amend. IV, U.S. Const 2, 9
Art. II, Sec. 10, N.M. Const. 2

STATUTES

N.M. S.A. Sec. 30-31-7 (1978) 3
N.M.S.A. Sec. 30-31-2 (1978) 2
N.M.S.A. Sec. 30-30-20 (1978) 2

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OPINIONS BELOW

The unpublished memorandum opinion of the Court of Appeals for the State of New Mexico, Cause No. 8207, filed October 10, 1985, is attached hereto at pages A-1/7 of the Appendix. The denial of Petition for Writ of Certiorari to the New Mexico Court of Appeals issued by the New Mexico Supreme Court on November 20, 1985, is attached here to at page A-8 of the Appendix.

JURISDICTION

The New Mexico Court of Appeals rendered its decision in this case on October 10, 1985. The Supreme Court of the State of New Mexico denied Santiesteban's Petition for Writ of Certiorari to the New Mexico Court of Appeals on November 20, 1985. This Court has jurisdiction to review the decision in question by writ of certiorari under Title 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are:

a) Fourth Amendment to the United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

b) Article II, Section 10, of the Constitution of the State of New Mexico, which provides:

The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by affirmation.

c) Section 30-30-20 of the New Mexico Statutes Annotated, 1978 Compilation, which provides:

A. As used in the Controlled Substantes Act "traffic" means the: . . . (3) possession with intent to distribute any controlled enumerated in Schedules I or II which is a narcotic drug. . .

B. Except as authorized by the Controlled Substances Act, it is unlawful for any person to intentionally traffic. Any person who violates this subsection is: (1) for the first offense, guilty of a second degree felony . . .

d) Section 30-31-2 of the New Mexico Statutes Annotated, 1978 Compliation which provides:

. . .P. "narcotic drug" means . . . (4) coca leaves and any salt, compound, derivative or preparation of coca leaves, any salt, compound, isomer, desrivative or preparation which is a chemical equivalent of any of these substances except decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine . . .

e) Section 30-31-7 of the New Mexico Statutes Annotated, 1978 Compliation, which provides:

A. The following controlled substances are included in Schedule II: (1) Any of the following substances. . . (d) coca leaves and any salt, compound, derivative or preparation of coca leaves, and any salt, conpound, deruvative or preparation thereof which is chemically equivalent or indential with any of these substances, but not including decocainized coca leaves or extractions which do not contain coccaine or ecgonine.

STATEMENT OF THE CASE

Petitioner Norberto Luis Santiesteban was convicted by a New Mexico State Court jury on September 11, 1984, of possession of cocaine with intent to distribute. He was arrested on March 27, 1984, as a result of the warrantless stop and search of his vehicle on that date by United States Border Patrol Officers, and the seizure of cocaine from within the spare tire in his car trunk.

Santiesteban is a Cuban immigrant who came to this country lawfully about five years ago with his family, including his wife, children and brother. He speaks very little English. Santiesteban, his wife and his brother Nelson had flown from their California home to Florida to try to emigrate his father. While there, Santiesteban purchased a vehicle, which the three were driving back to California. In the early afternoon of March 27, the vehicle approached the fixed Border Patrol checkpoint on Interstate 10 about 20 miles west of Las Cruces, New Mexico. As the car approached the officer who was inspecting vehicles, the officer waved the auto through the checkpoint without asking any questions. As the vehicle pulled up to the investigating officer, the driver slowed down and lowered his window ½ to ¾ of the way down.

As the vehicle went through from the checkpoint, two officers inside the Border Patrol checkpoint trailer watched the inspecting agent wave the car on, and noticed that the vehicle had temporary license plates from Florida. Because of the temporary Florida plates, the two (Dale Jones and Joe Ramirez) decided to chase and stop the car. Ramirez and Jones testified that, from their experience, sometimes cars with Florida plates are driven by foreigners, and sometimes those foreigners are illegal aliens. Ramirez did not notice anything unusual about the driver, and

though he saw the driver's face he could not see anything about the driver which would indicate ethnicity. Jones claimed he noticed that the two persons in the front seat appeared to be of Latin decent, but he could not articulate why he concluded that. Basically, it was his "gut feeling." Ramirez claimed he thought it unusual that the vehicle did not come to a complete stop, even though the inspecting agent waved it through. He said he thought it unusual that the car did not deliberately pull up close to the inspection booth, "which people normally do." Jones did not notice anything unusual about the way the vehicle pulled up to and away from the checkpoint. Jones claimed he thought it unusual that the vehicle's windows were tinted, and that the driver did not roll his window all the way down when passing through the checkpoint. Ramirez did not claim during the motions hearing that the car windows amounted to an unusual situation.

After the vehicle passed through the checkpoint, both officers questioned the inspecting agent about it. Ramirez claimed he asked the agent where the occupants were from, and the agent responded that he had not talked to them, but "they could have been Cuban for all I know." Jones claimed the agent told him the occupants appeared to be Cuban, "so he just let them to go on." Jones and Ramirez then pursued the car.

The two Border Patrolmen, using the red lights of their marked vehicle, stopped the Santiesteban vehicle several miles west of the checkpoint. Ramirez, in uniform, approached the car while Jones stayed back. Ramirez first indicated to the car's driver (Santiesteban's brother) that he was speeding. The brother responded that he did not believe he was speeding, but the odometer was not working and perhaps the officer was correct. Ramirez secured the three occupants' immigration cards, as well as the brother's driver license and the vehicle ownership papers. Ramirez ascertained that Petitioner was the vehicle's owner. Ramirez then asked to look in the car trunk, and Nelson, the driver, got out of the car and opened the trunk. The officer asked him to open a suitcase in the trunk, and he complied. Jones then approached the Santiesteban vehicle. Ramirez informed Jones that he was going to run checks on the Santiestebans' documents. Ramirez took Petitioner to his unit while he checked the documents. There was nothing irregular with the vehicle ownership documents. The Border Patrolmen verified that the Santiestebans were lawful residents of the United States at the scene of the initial stop.

The officers claimed that when they approached the vehicle after the stop, they noticed the strong odor of perfume in the

vehicle. Ramirez testified that heavy odors are sometimes used to mask the smell of drugs, but he acknowledged that perfume can be legitimately used in a vehicle to mask the smell of cigarettes or to simply make the car smell nice. While the car was stopped on the highway, Ramirez advised the Santiestebans that he suspected the vehicle contained drugs.

The officers then asked the Santiestebans to take the vehicle back to the Border Patrol checkpoint for a complete search, as the officers did not have the proper tools in their unit. The Santiestebans agreed to do so. Jones acknowledged that the only reason for taking the vehicle back to the checkpoint was to search for drugs. The officers required Nelson Santiesteban to ride back to the checkpoint in the Border Patrol car with Ramirez, while Jones rode back in the Santiesteban vehicle driven by Petitioner. The officers apparently retained Santiesteban's identification documents. The initial stop on the highway lasted five to 15 minutes.

Back at the checkpoint, the Border Patrolmen began searching the vehicle after the Santiestebans were taken inside the trailer at the checkpoint. Petitioner signed a written consent to search. The Santiestebans testified that the written consent was presented to and signed by Petitioner after the search was already underway. The officers testified that the consent was signed before the search was started. The officers removed the spare tire from the trunk to try to see behind the back seat. Jones claimed that when he was removing the spare tire, he first noticed that it felt heavy and then felt something inside it move. Ramirez claimed that a shiny lacquer covered part of the tire. The officers let air out of the tire and claimed they could smell a medicinal odor.

The officers summoned narcotics agents, who arrived at least an hour after the vehicle was taken back to the checkpoint. The Santiestebans were held in the Border Patrol trailer until agents arrived. The agents secured Petitioner's agreement to open the tire to look in it. The tire was taken by agents to a gas station and opened, the cocaine found inside. Petitioner thereupon was given his Miranda rights.

Nelson Santiesteban said one of the officers told him he could refuse consent to search, but if he did so the officers would get an order to search anyway. He acknowledged that he told the officer he could look in the car trunk, and that he voluntarily returned to the checkpoint. Petitioner testified that he did not believe he had a right to refuse to consent to a search, to refuse to talk to the officers and to leave the scene, as in Cuba individuals cannot refuse to talk to police. He was never told that he had a right to refuse to consent to a search and a right to leave freely. Ramirez denied

telling the Santiestebans that if they refused consent to search, he would get an order to search anyway.

On June 11, 1984, Santiesteban filed a written Motion to Suppress the cocaine, alleging that the "stop, search and seizure were in violation of (his) rights to be free from unreasonable searches and seizures under the constitutions of the State of New Mexico and United States." Record at pp. 17-18. After an evidentiary hearing the trial court denied the motion in a written order filed July 17, 1984. Record at p. 25. The suppression motion was renewed unsuccessfully during trial. Transcript at pp. 84-85. After the filing of his notice of appeal, Petitioner raised the validity of the search as an appellate issue by designating as an issue on appeal "whether the (trial) Court erred in denying suppression of the cocaine." Docketing Statement at p. 8. In his brief-in-chief in the state appeals court, Petitioner argued that the stop, search and seizure were impermissible violations of his constitutional rights. Appellant's Brief-in-Chief at pp. 1-23. The appellate court reviewed this claim in deciding the appeal. Ct. App. Op., A-1. In his Petition for Writ of Certiorari filed in the New Mexico Supreme Court, he designated as the question presented as "whether Defendant's consent to search, obtained as the result of an unlawful stop and detention, was . . . tainted by the prior illegality." Petition for Certiorari at A-8.

ARGUMENT

THE STATE COURT'S HOLDING THAT CONSENT ALONE AUTOMATICALLY VALIDATES AN OTHERWISE UNCONSTITUTIONAL SEARCH IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS AND SHOULD BE REVIEWED TO RESOLVE THE CONFLICT.

The New Mexico appellate courts ruled that consent alone automatically validates an otherwise unlawful search and seizure, in direct conflict with this Court's decisions. The state court approval of the deprivation of Petitioner's constitutional rights should be reviewed.

This Court has long held that both direct and indirect fruits of unlawful action by law enforcement officers cannot be used against an accused, unless an independent intervening event purges the taint of illegality. Wong Sun v. U.S., 371 U.S. 471 (1963). Voluntary confessions and evidence gained from consent searches are tainted and thus inadmissible against defendants, if obtained via exploitation of prior illegal arrest or detention. Wong Sun v. U.S., 371 U.S. 471 (1963); Brown v. Illinois, 422 U.S. 590 (1975). Three factors have

been identified as crucial to a determination of whether the event at issue is tainted by an illegal detention or arrest--the temporal proximity of the unlawful arrest or detention and the event at issue, the presence of intervening circumstances, and the purpose and flagrancy of the unlawful conduct by officials. Taylor v. Alabama, 457 U.S. 687 (1982); Dunaway v. New York, 442 U.S. 200, 218 (1979); Brown v. Illinois, 422 U.S. 590, 603-04 (1975). Whether seized evidence is tainted by a prior illegality depends on application of the three factors to the individual case.

Here, the state court did not analyze these factors to ascertain whether the consent to search was tainted. The New Mexico court correctly held that the Border Patrolmen did not have the required reasonable articulable suspicion of illegality to stop Petitioner's vehicle, and consequently the stop was unconstitutional. See Ct. App. Op., A-5; U.S. v. Brignoni-Ponce, 422 U.S. 873, 884 (1975). But then the court went on to hold that because Petitioner voluntarily consented to a search of his car, the ensuing search was lawful. The court failed to inquire into whether the consent was obtained because of exploitation of the illegal stop. In effect, it held that a voluntary consent automatically legitimizes an otherwise illegal search. The Court of Appeals decision was in direct conflict with this Court's decision in Wong Sun, Dunaway, Brown, Taylor, Florida v. Royer, 460 U.S. 491 (1983); Davis v. Mississippi, 394 U.S. 721 (1969) and Hayes v. Florida, _____U.S. _____, 103 S.Ct. 1643 (1985)

This Court firmly established in Brown, Dunaway and Taylor that simply because a confession is voluntary for purposes of the Fifth Amendment does not mean it is untainted by a prior illegal arrest. A finding of voluntariness is only a threshold requirement; the courts must make an independent determination, using the three identified factors, of whether the confession was the product of exploitation of the prior illegality. Taylor, 687 U.S. at 690. While those three cases involved confessions, the same principle applies and the same analysis must be undertaken when a consent search is at issue. See e.g., Florida v. Royer, 460 U.S. 491 (1983); U.S. v. Robinson, 690 F.2d 869 (11th Cir. 1982); U.S. v. Berry, 670 F.2d 583 (5th Cir. 1982). When an individual is being detained illegally, neither his voluntary confession nor results of his voluntary consent to search can be used against him unless the government can establish that the taint of illegality is purged. The same standard applies to determine whether the taint is purged, regardless of whether the evidence at issue is a confession or fruits of a consent search. In Davis v. Mississippi, 394 U.S. 721, 724 (1969), the Court

rejected the claim that a less stringent standard applies to physical evidence as opposed to statements. By ignoring this Court's mandated standards and analysis for determining whether Petitioner's consent to search was tainted, the New Mexico courts have deprived him of his constitutional rights.

This Court in Florida v. Royer specifically relied on the standards established in Brown and Dunaway in deciding a case presenting an issue identical to the one being litigated here. In addition, the various federal Courts of Appeal have applied the Brown three-part test in similar cases, finding that the results of voluntary consent searches were inadmissible against defendants because the taint of prior illegal detentions was not attenuated. U.S. v. Thompson, 712 F.2d 1356 (11th Cir. 1983); U.S. v. Recalde, 761 F.2d 1448 (10th Cir. 1985); U.S. v. Perez-Esparza, 609 F.2d 1284 (9th Cir. 1979); U.S. v. Robinson, 690 F.2d 869 (11th Cir. 1982), see previous opinion at 625 F.2d 1211 (5th Cir. 1980). See also, U.S. v. Gooding, 695 F.2d 78 (4th Cir. 1982); U.S. v. Melendez-Gonzalez, 727 F.2d 407 (5th Cir. 1984); U.S. v. Sanchez-Jaramillo, 637 F.2d 1094 (7th Cir. 1980); U.S. v. Cherry, 759 F.2d 1196 (5th Cir. 1985); U.S. v. Gonzales, 763 F.2d 1127 (10th Cir. 1985); U.S. v. Waksal, 709 F.2d 653 (11th Cir. 1983); U.S. v. Moreno, 742 F.2d 532 (9th Cir. 1984). There is no support for the New Mexico court's elimination of the constitutional analysis required to determine whether Petitioner's consent to search was tainted. The state courts have made a radical change in constitutional law, in direct conflict with many of this Court's recent decisions. This court should grant the Petition for Writ of Certiorari to correct the grievous error made by the state courts, and to review the merits of Petitioner's suppression motion using proper constitutional standards.

When the Taylor/Brown/Dunaway analysis is applied to the facts of Petitioner's case, it is obvious that the state courts decided the issue wrongly. The temporal proximity between the illegal stop and detention and the consent was close -- one continuous encounter. Petitioner was stopped unlawfully and continuously held until consent to search was obtained. There was no meaningful intervening event, as required by Taylor. There was no intervening event whatsoever, not even a Miranda warning or notice of right to refuse consent to search. The purpose and flagrancy of the official misconduct here also mandates a finding of tainted consent. The officers were on a fishing expedition hoping to find drugs, having no lawful justification for stopping Petitioner's vehicle. They seized the opportunity presented by the illegal stop

to uncover evidence which could not be obtained lawfully. They took Petitioner back to their checkpoint, taking advantage of his status as a Cuban immigrant unaware of his rights and his desire to be cooperatove. There was nothing in this case to attenuate the taint of illegality; thus, the evidence seized pursuant to the consent search was obtained in violation of Petitioner's Fourth Amendment rights.

This case is legally indistinguishable from Florida v. Royer, 460 U.S. 491 (1983), where this Court suppressed evidence gained through a consent to search obtained during an illegal detention. In both cases, officers stopped the defendants and obtained and apparently retained the suspects' identifications. In both cases, the officers informed the defendants that they suspected drug transportation and took the individuals to a 'police station.' In both cases, the defendants were questioned and were never told they were free to leave. Just as the consent in Royer was tainted, it was tainted here. The State of New Mexico cannot be allowed to validate the deprivation of Petitioner's Fourth Amendment rights by law enforcement officers. His conviction must be reversed by this Court.

The state courts also wrongly decided that Petitioner's consent to search his vehicle was voluntary. To uphold a search based on consent, the voluntariness of the consent must be clearly and convincingly shown by the totality of the circumstances. Bumper v. North Carolina, 391 U.S. 543 (1968); U.S. V. Mendenhall, 446 U.S. 544 (1980). Courts indulge every reasonable presumption against a waiver of the right to refuse consent to search; U.S. v. Abbot, 546 F.2d 883, 885 (10th Cir.), cert. den. 430 U.S. 966 (1977). In this case, Petitioner speaks little English, was unaware of his rights and was not informed he could refuse to consent to a search. He was stopped with a show of force, his identification apparently was confiscated, and he was transported to a police facility. He was not given a Miranda warning until after he consented to a search. Under these facts, the government cannot be said to have proved voluntary consent by clear convincing evidence. At best, the consent was mere acquiescence to perceived authority and thus was involuntary as a matter of law. Bumper v. North Carolina, 391 U.S. 543 (1968). The state courts erred in finding voluntary consent. This Court should review the case and correct the constitutional error.

CONCLUSION

For the reasons stated herein, Petitioner Norberto Santiesteban respectfully requests this Court to grant his Petition for Writ of Certiorari to the New Mexico Supreme Court, to reverse his conviction and to order that the evidence seized pursuant to the search be suppressed.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed via first class mail to the New Mexico Attorney General, Criminal Division, Post Office Drawer 1508, Santa Fe, New Mexico 87503, on this _____ day of January, 1986.

MICHAEL W. LILLEY

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
NORBERTO LUIS SANTIESTEBAN,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF
DONA ANA COUNTY
GARNETT R. BURKS, JR., District Judge

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ALLRED-LILLEY
Las Cruces, New Mexico — Attorneys for Defendant-Appellant

MEMORANDUM OPINION

DONNELLY, Chief Judge

Defendant appeals from a conviction of possession of a controlled substance (cocaine), with intent to distribute, following his jury trial. On appeal defendant challenges the legality of the stop and subsequent search of his vehicle by law enforcement officers, and asserts that the trial court erred in denying his motion to suppress. We affirm.

FACTS

During the afternoon of March 27, 1984, defendant, a Cuban immigrant living in California, his wife, and brother, were traveling in a second-hand automobile recently purchased by defendant in Florida. Defendant's brother was driving the vehicle. When the vehicle approached a fixed border patrol checkpoint located on Interstate Highway 10, approximately 20 miles west of Las Cruces, defendant's brother slowed down and lowered his window, but the inspection agent waived the automobile through without stopping or questioning the occupants.

When defendant's vehicle passed through the checkpoint, two

other border patrol agents sitting inside the facility observed that the car bore a temporary Florida license. The two agents, Dale Jones and Joe Ramirez, went outside and asked the inspecting officer if he had spoken to the car's occupants. The officer replied that he had not and that he was not certain about the nationality of the individuals in the car. He stated that "[they] could have been Cuban for all I know."

After hearing the officer's response, agents Jones and Ramirez got into their patrol car and using their emergency lights, pursued the vehicle, stopping it approximately eight to ten miles west of the checkpoint. Ramirez, who was in uniform, approached dependant's car and inquired whether the occupants were United States citizens. The three responded that they were resident aliens. Ramirez then asked to see their immigration cards, the driver's motor vehicle license, and the vehicle's ownership papers. An inspection of these documents revealed that defendant was the owner of the vehicle.

Ramirez then asked to look in the car's truck, and defendant's brother opened the trunk. Ramirez ran a radio check on each of the three individuals. A short time later, the radio check verified the vehicle's ownership and confirmed that the Santiestebans were resident aliens. Ramirez stated that he smelled a "heavy" perfume odor inside the vehicle. He asked defendant if he would accompany him back to the border patrol checkpoint. Both defendant and his brother agreed to accompany the agents back to the checkpoint. Agent Jones stated that the only reason to take the vehicle back to the checkpoint was to search for drugs.

The initial stop on the highway lasted between five and fifteen minutes. When they returned to the checkpoint, defendant signed a written consent to search, and the Santiestebans were taken inside the checkpoint trailer. The officers began searching the vehicle and found a canister of air freshener under the front seat. During the search, the officers took out the car's seats, opened luggage, and removed the spare tire. Jones testified that when he lifted the tire it felt heavy, and he noticed something inside the tire move.

The border patrol agents then summoned narcotics agents, who arrived approximately one hour after the vehicle had initially returned to the checkpoint. Both the border patrol agents and the narcotics officers then secured consents from defendant to look inside the tire. Agents asked defendant to accompany them to a nearby gas station where the tire could be taken off the rim. Defendant again gave his consent. Upon opening the tire, the agents discovered six packages of cocaine concealed therein. Defendant was thereupon arrested.

Defendant testified that he did not know that he had a right to refuse to give his consent to a search of the vehicle and that after his car was initially halted, he did not feel free to leave at any time. He stated that if he had known he had a right to leave, he would have done so. Defendant also testified that Ramirez told him that if he refused to consent to the search, he would get a search warrant anyway; Ramirez denied making this statement.

The trial court denied the motion to suppress, finding that defendant had given a valid consent for the search and that the circumstances leading up to the initial stop of defendant's vehicle were not sufficient to taint the subsequent search.

Defendant contends that the subsequent stopping of his car after it had been waived through the border patrol checkpoint was illegal and that the unlawful nature of this stop and his detention tainted any subsequent consent to search given by defendant.

The state contends that the stop of defendant's automobile should be upheld because it was the functional equivalent of a border stop and search. In State v. Gonzales, 97 N.M. 182, 637 P.2d 1237 (Ct.App.1981), this court discussed the legality of border searches. Border searches are a recognized exception to the fourth amendment's proscription against unreasonable searches and seizures. As noted in Gonzales, a traveler who has crossed an international boundary may be stopped and required to identify himself and his belongings. Moreover, authorities may search baggage and other belongings brought by a traveler across a national border. Id. See also State v. Franco, 94 N.M. 243, 608 P.2d 1125 (Ct.App.1980). The requirement that a person stop and submit to a border search is not restricted to searches carried out at the actual border, so long as they occur at a functional equivalent or constitute an extended border search. State v. Gonzales. See also Annot., 6 A.L.R.Fed. 317 (1971).

Gonzales held that border searches are reasonable by virtue of the fact that they occur at the border however, "[f]or the extended border category to be applicable there must have been a border crossing. A border crossing is a critical fact." Id. at 187. It is undisputed in the instant case that defendant did not cross the international border, but was traveling through the United States en route to California.

Defendant asserts that since his vehicle was allowed to pass through the border patrol checkpoint and was subsequently halted some distance away, the stop was a roving patrol stop which must be based upon a reasonable suspicion. State v. Franco. In Franco this court held that,

> [t]he reasonable suspicion must be based on specific articulable facts and rational inferences from the facts . . . "the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." The officer's assessment of the facts and the reasonableness of the officer's suspicion is to be judged by an objective standard. State v. Galvan, 90 N.M. 129, 560 P.2d 550 (Ct.App.19770).

94 N.M. at 244.

Defendant argues that the grounds relied upon by the officers herein for the pursuit and stop of the vehicle were not based upon a reasonable suspicion supported by specific articulable facts.

The Supreme Court in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), discussed the authority for law enforcement officers in stopping individuals to determine their residency status stating:

> [W]hen an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in Terry [v. Ohio, 392 U.S. 1 (1968)], the stop and inquiry must be "reasonably related in scope to the justification for their initiation . . ." The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

Id. at 881-882 (citation omitted).

Officers Jones and Ramirez testified that their grounds for pursuing defendant's vehicle after it left the checkpoint were the uncertainty of whether the occupants were aliens and the fact that the vehicle bore a temporary Florida license. Jones testified that when they observed the car drive on "[w]e both kind of batted it around there for a few seconds and we thought, well since he [the checking officer] didn't ask him, maybe we should go down and have another look at him and see what he is."

Both defendant and his brother testified that Officer Ramirez told them he suspected them, perhaps unwittingly, of transporting drugs. Defendant's brother testified that Ramirez stated:

> He said that he was suspicious because the cars that were sold in Florida at a low price and, then, the person who bought it did not know whether there was something in the car and that they knew such a thing was happening with cars that

> when one would buy it, when one arrived at one destination, someone else would buy the car from one or the car was stolen from the person.

Agent Jones testified that Ramirez asked defendant if he would mind accompanying him back to the checkpoint and advised him that we had quite a large amount of cocaine coming out of the Florida area, particularly with "subjects with temporary tags."

We agree with defendant's contention that the basis for the pursuit and stop of defendant's vehicle was not supported by a reasonable suspicion based upon sufficient articulable facts. State v. Gonzales; State v. Franco.

Does the fact that defendant's car was improperly stopped irrevocably taint any subsequent consent to search that may thereafter be given? New Mexico follows the rule that even though the basis of an initial stop of a vehicle may have been without reasonable suspicion grounded upon specific articulable facts, a voluntary consent to search can validate an improper initial stop and warrantless search. State v. Herring, 77 N.M. 232, 421 P.2d 767, cert. denied, 388 U.S. 923 (1966); State v. Ruud, 90 N.M. 647, 567 P.2d 496 (Ct.App.1977) In Ruud the court stated:

> [W]e do not hold that a stop without reasonable suspicion that the law had been or was being violated taints all that follows. However, the voluntary nature of any consent that follows must be established by clear and positive evidence with the burden of proof on the state. State v. Carlton, [82 N.M. 537, 484 P.2d 757 (Ct.App.1971)].

90 N.M. at 652.

Following the initial stop of defendant's vehicle, both defendant and his brother agreed to accompany the agents back to the checkpoint and consented to the search. Nelson Santiesteban testified that he did not feel free at anytime to leave. He said that Officer Ramirez informed him that he could refuse to consent to a search, but that if he did, the agents could obtain a search warrant anyway. Defendant denied that he knew he could refuse to consent to the search or to speak with the officers.

The trial court in denying defendant's motion to suppress stated:

> To begin with, almost immediately, as I recall the evidence here, these people almost invited the agents to search. And I think that the consent here was absolutely free and voluntary. And even assuming an illegal stop, I do not believe that it was such as to taint the search.

In State v. Herring, the court held that consent to search can

validate evidence obtained, where absent such consent the search would otherwise have been unlawful. When the state contends that permission to search was consensual, the state bears a heavy burden of proving voluntariness. See also State v. Bidegain, 88 N.M. 466, 541 P.2d 971 (1975); State v. Ruud; State v. Cohen, 24 SBB 388 (Ct.App.), cert. granted (1985).

The question of whether an accused's consent to search was voluntarily given, and not the product of duress or coercion, turns upon the facts of each case and is based upon the totality of the circumstances. State v. Aull, 78 N.M. 607, 435 P.2d 437 (1967); State v. Sneed, 76 N.M. 349, 414 P.2d 858 (1966); State v. Austin, 91 N.M. 793, 581 P.2d 1288 (Ct.App. 1978); State v. Ruud. Conflicts in the evidence are to be resolved by the trial court. State v. Johnson, 99 N.M. 682 P.2d 1349 (1983).

When the testimony is conflicting, but there is substantial evidence to support the finding of the trial court, a reviewing court will not reweigh the evidence. State v. Harge, 94 N.M. 11 606 P.2d 1105 (Ct.App.1979); State v. Ramirez, 89 N.M. 635, 556 P.2d 43 (Ct.App.1976); See also State v. Gonzales, 96 N.M. 556 632 P.2d 1194 (Ct.App.1981).

Our review of the evidence reveals that there was substantial evidence to support the finding of the trial court that the consent was voluntarily given. Based upon the foregoing, the judgment of the trial court is affirmed.

IT IS SO ORDERED.

THOMAS A. DONNELLY, Chief Judge

WE CONCUR:

JOE W. WOOD, Judge

PAMELA B. MINZNER (Specially Concurring)

MINZNER, Judge (specially concurring).

I agree with the majority that defendant's car was improperly stopped and that the stop was improper for the reasons stated by the majority. I also agree with the result as to the consent issue and to the statement of the law and the facts in support of the results. To the majority's discussion of the consent issue, however, I would add that testimony by the officers, defendant and his brother support the trial court's findings of consent and the lack of any taint

arising from the illegal stop. Under these circumstances, it is not necessary to reach any other issues. Cf. State v. Cohen, 24 SBB 388 (Ct.App.) cert. granted (1985) (trial court findings that defendant had been illegally detained and that the illegal detention had tainted defendant's consent sustained).

PAMELA B. MINZNER, Judge

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, November 20, 1985

NORBERTO SANTIESTEBAN,
Petitioner,
vs.
STATE OF NEW MEXICO
Respondent.

NO. 16,126

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 8207 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY
SEAL

Rose Marie Alderete (signed)

Clerk of the Supreme Court
of the State of New Mexico

Supreme Court, U.S.
FILED
APR 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1210

IN THE

Supreme Court of the United States

October Term, 1985

NORBERTO LUIS SANTIESTEBAN,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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19pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED 7

A. The Case Has No Precedential Value 8

B. The Result Will Not Change upon Review of the Case by the Court 8

C. The Case Is Factually Distinguishable From This Court's Decisions on the Issue of Illegal Arrests and Their Fruits 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES:

Brown v. Illinois,
422 U.S. 590 (1975) 10, 13

Davis v. Mississippi,
394 U.S. 721 (1969) 10, 11

Dunaway v. New York,
442 U.S. 200 (1979) 10, 11

Florida v. Royer,
460 U.S. 491 (1983) 7, 10, 11, 13

Hayes v. Florida,
___U.S.___, 105 S.Ct. 1643 (1985) 10, 11

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 8, 10

Taylor v. Alabama,
457 U.S. 687 (1982) 10

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 8, 9, 11, 12, 14

United States v. Brown,
499 F.2d 829 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974) 8

United States v. Maggard,
451 F.2d 502 (5th Cir.), *cert. denied*, 405 U.S. 1045 (1972) 8, 9, 14

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 8, 9, 11, 12

United States v. Mejias,
452 F.2d 1190 (9th Cir. 1971) 9

United States v. Mendenhall,
446 U.S. 544 (1980) 9, 12

United States v. Nieves,
609 F.2d 642 (2nd Cir. 1979) 8

United States v. Palmer,
575 F.2d 721 (9th Cir. 1978) 8, 14

United States v. Place,
462 U.S. 696 (1983) 11

United States v. Wardlaw,
576 F.2d 932 (1st Cir. 1978) 8

Wong Sun v. United States,
371 U.S. 471 (1963) 10, 11, 13, 14

NEW MEXICO RULE CITED:

Rule 601(c), New Mexico Rules of
Appellate Procedure for Criminal,
Children's Court, Domestic Relations
Matters and Workers' Compensation
Cases, NMSA 1978 (1983 Repl. Pamp.) 8

OTHER AUTHORITIES CITED:

Maguire, Evidence of Guilt (1959) 10

No. 85-1210

IN THE

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October Term, 1985

NORBERTO LUIS SANTIESTEBAN,
Petitioner,

v.

STATE OF NEW MEXICO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, State of New Mexico, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the denial of a petition for writ of certiorari by the New Mexico Supreme Court and of the Memorandum Opinion of the New Mexico Court of Appeals in this case.

STATEMENT OF THE CASE

To ensure that the Court's resolution of the petition for writ of certiorari is based on a statement of the case which is relevant, fair and accurate, Respondent sets forth the following facts.

In his petition, Petitioner states that he "speaks very little English." (Petition 3). All conversation among Petitioners, his brother, border patrol agents, and narcotics officer was in Spanish. (Supplemental Transcript of Proceedings 12, 53, 69-70, 79). The Santiestebans did not testify that they did not understand what the officers said to them. Moreover, Petitioner testified specifically that he "understood perfectly well what he (Border Patrol Agent Ramirez) was saying." (Supp. Tr. 79). Petitioner's brother also testified that he understood "perfectly" what Agent Ramirez said to and asked of him. (Supp. Tr. 69-70). Agent Ramirez was the primary officer speaking with the Santiestebans.

In relating the bases for the agents' decision to pursue Petitioner's vehicle after it had left the fixed border patrol checkpoint, Petitioner states "Ramirez claimed he thought it was unusual that the vehicle did not come to a complete stop, even though the inspecting agent waved it through." (Petition 4). The latter part of Petitioner's statement, "even though . . . through," is an editorialization by Petitioner and not testimony by the agent. (Supp. Tr. 8). Agent Ramirez did testify that he thought it was unusual that Petitioner's vehicle did not make a complete stop or pull up to the inspection booth which is normal for people to do. He additionally testified that the agents "found in the past that people that don't really want to get too close to us will stay in the middle of the lane." (Supp. Tr. 8). Based on his past experience at the checkpoint, it has been Agent Ramirez' experience that people in cars with

Florida license plates sometimes are foreigners and "quite a few of them . . . are out of status" with United States' immigration requirements. (Supp. Tr. 18-19). Agent Ramirez has been a border patrol agent for ten years. (Supp. Tr. 16).

In relating what drew his attention to Petitioner's vehicle at the checkpoint, Agent Jones mentioned the vehicle's windows and described them as "dark" and "blacked out". (Supp. Tr. 39). Agent Jones had been a border patrol agent for nine and a half years. (Supp. Tr. 29). It was his experience that people sometimes enter the United States through Florida, buy a car there, and thereafter go to other points in the United States. (Supp. Tr. 32). His particular experience with vehicles with temporary Florida license tags is that the vehicles' occupants have always been aliens. (Supp. Tr. 32, 42).

Petitioner's vehicle was stopped by Agents Ramirez and Jones three to ten miles west of the checkpoint. (Supp. Tr. 44, 63, 73). Petitioner testified the vehicle was stopped "about three or four miles" from and "perhaps five minutes" after they had left the checkpoint. (Supp. Tr. 73). His brother testified that the vehicle was stopped "three miles, more or less" from the checkpoint. (Supp. Tr. 63).

Agent Ramirez did the initial questioning while agent Jones stayed at the agents' vehicle. (Supp. Tr. 33). Agent Ramirez testified that he asked the three occupants for citizenship papers. (Supp. Tr. 10). He received immigration papers from them and the driver's license from the driver, Petitioner's brother, Nelson Santiesteban. (Supp. Tr. 10, 19-20). (Nelson, but not Agent Ramirez, testified that the agent told him he was speeding. (Supp. Tr. 64).

Agent Ramirez asked Nelson whether anybody was in the trunk. (Supp. Tr. 27). Nelson replied "no". Agent Ramirez next asked permission to look into the trunk after which

Nelson said "sure", "readily took the ignition keys", walked to the trunk,and opened it. (Supp. Tr. 27-28). Nelson testified that he had "absolutely" no objection to opening the trunk and that "at no time" was he forced to open the trunk. (Supp. Tr. 69-70). Petitioner testified that he had no objection to having Agent Ramirez look in the trunk. (Supp. Tr. 80).

Agent Ramirez testified that he looked into the trunk but did not look into any suitcases. (Supp. Tr. 20). He indicated that a suitcase might have been opened by one of the subjects in order to retrieve his identification papers. (Supp. Tr. 20-21). Agent Jones did not see any search made of the contents of the trunk. (Supp. Tr. 44-45). Nelson offered conflicting testimony of a search by Agent Ramirez of suitcases. (Supp. Tr. 65).

Agent Ramirez testified he consulted with Agent Jones at their vehicle on the authenticity of the immigration papers he had received. According to Agent Ramirez, the agents decided that it was necessary to go back to the checkpoint to verify the papers. (Supp. Tr. 10, 12, 21). Agent Ramirez testified that he normally verifies the immigration card by passing it under a purple light device which detects a code on authentic immigration cards. (Supp. Tr. 21, 18). The device is kept at the checkpoint. (Supp. Tr. 21, 28).

After Agent Ramirez talked to Agent Jones about verification of the immigration papers, he asked Petitioner whether he would mind going back to the checkpoint. (Supp. Tr. 11). Petitioner answered affirmatively and said "why not, he had no reason not to." (Supp. Tr. 11). Petitioner was very cooperative. (Supp. Tr. 11).

The agents also, on the highway, talked to Petitioner and his brother about the recurring problem of drugs being secreted in cars sold in Florida, without the buyers' knowledge. (Supp. 35, 45, 66). During Agent Ramirez' initial encounter with

Petitioner's vehicle on the highway, the agent noticed an extremely heavy perfume-like odor coming from inside the car. In his experience as a border patrol agent, Agent Ramirez had previously encountered such odors being used to mask the smell of illegal drugs. (Supp. Tr. 11-12). Agent Jones also noticed the smell when he approached the vehicle. (Supp. Tr. 34).

Petitioner and his brother testified that Agent Ramirez asked each whether he had any reservations about going back to the checkpoint to search the vehicle for drugs. (Supp. Tr. 65, 75). Petitioner further testified that he understood what the agent asked of him, that he had no objection to returning to the checkpoint, and that he was not forced to go back against his will. (Supp. Tr. 80-81). His brother testified that he had "no reservations", "absolutely" no objection to returning to the checkpoint, and voluntarily returned. (Supp. Tr. 66, 70-71). Agent Jones testified that the vehicle's occupants were not under arrest. (Supp. Tr. 36).

The initial stop on the highway lasted between five and fifteen minutes. When the agents and the three occupants of Petitioner's car returned to the checkpoint, all went inside the checkpoint trailer office. (Supp. Tr. 23, 67). A third agent at the checkpoint left as soon as they drove up, leaving agents Ramirez and Jones alone with the Santiestebans. (Supp. Tr. 23). Petitioner, his brother, and his wife were "not handcuffed or restrained in any way." (Supp. Tr. 53). Agent Ramirez ran a check on the immigration cards. (Supp. Tr. 12). He asked Petitioner again whether the agents could search the vehicle. (Supp. Tr. 12). Petitioner said he had no complaints about a search of the car. (Supp. Tr. 12). Agents Ramirez and Jones explained "fully" in Spanish a written consent to search form to Petitioner; Petitioner thereafter signed the form, indicating that he understood its contents. (Supp. Tr. 12-13). Agent Jones testified Petitioner said he had no objection to the search and

had nothing to hide. (Supp. Tr. 37). Petitioner testified he had no reservations about the search. (Supp. Tr. 75). His brother also testified he had no objection to the search of the car. (Supp. Tr. 71).

Agents Ramirez and Jones left the trailer to search the car leaving Petitioner, his brother, and wife alone in the trailer. (Supp. Tr. 14-15, 23, 37-30, 67). They removed from the vehicle the spare tire which appeared to have something inside. The agents returned to and advised Petitioner they believed something was in the tire. They asked him whether he had any objection to their taking it apart. (Supp. Tr. 15, 39). Petitioner answered, "Sure, no problem; go right ahead." (Supp. Tr. 39).

The border patrol agents summoned narcotics officers, who arrived approximately a half hour to an hour after the vehicle had initially returned to the checkpoint. (Supp. Tr. 15, 16, 68). The border patrol agents and the narcotics officers again obtained consent from Petitioner to look inside the tire. (Supp. Tr. 53-54). Petitioner testified that in reply to the officers' request, "I said, yes, I was not committing any crimes; so I said yes." (Supp. Tr. 77). The officers asked him to accompany them to a nearby gas station where the tire would be taken off its rim. Petitioner again gave his consent. (Supp. Tr. 54). Upon opening the tire, the officers discovered six packages of cocaine concealed therein. Petitioner was thereupon arrested.

Petitioner testified that he did not believe that he was free to leave. (Supp. Tr. 76). The only basis he offered for this belief was that

> [i]n Cuba that if a policeman stopped us, we cannot say no, I don't want to talk to you. That is against the law, if a policeman stops you in Cuba.

(Supp. Tr. 76). The only basis offered by Petioner's brother for his similar belief was that he did not know that he had the

right to walk away. (Supp. Tr. 68). Had he known of the right, he would have said good-bye to the officers and continued on his way. (Supp. Tr. 68).

On appeal of his conviction, challenging the denial of his motion to suppress, to the New Mexico Court of Appeals, Petitioner stated *inter alia* "[i]t is uncontested that Defendant agreed to allow a search of his automobile and its spare tire." (Petitioner's Brief in Chief 15). The appellate court held Petitioner's car was improperly stopped. The appellate court next asked, "Does the fact that defendant's car was improperly stopped irrevocably taint any subsequent consent to search that may thereafter be given?" (Petition A-5). The court stated that "[f]ollowing the initial stop of defendant's vehicle, both defendant and his brother agreed to accompany the agents back to the checkpoint and consented to the search." (Petition A-5). Applying the totality of circumstances standard, the court held that Petitioner's voluntary consent validated the search of his car. (Petition A-6).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner contends the Court should grant his petition because the New Mexico appellate courts have held that consent alone automatically validates an otherwise unlawful search and seizure, in direct conflict with this Court's decisions on the issue of illegal detentions and the exclusion of evidence as their fruits. The Court's discretionary review should not be exercised on behalf of Petitioner where the case has no precedential value, its result will not be changed upon review by the Court, and the case is factually distinguishable from the decisions of the Court.

A. The Case Has No Precedential Value.

The opinion rendered by the New Mexico Court of Appeals was a memorandum opinion. Under New Mexico Rules of Appellate Procedure, a memorandum opinion is not published and may not be cited as precedent. New Mexico Rules of Appellate Procedure for Criminal, Children's Court, Domestic Relations Matters and Worker's Compensation Cases, Rule 601(c), NMSA 1978 (1983 Repl. Pamp.). Thus, unless the result reached by the appellate court is wrong, this Court should not exercise its discretion to review the analysis of an opinion which has no precedential value.

B. The Result Will Not Change upon Review of the Case by the Court.

The New Mexico Court of Appeals determined that Petitioner's vehicle was improperly stopped. Respondent submits that determination is incorrect and that consequently Petitioner's voluntary consent to search his vehicle for drugs was without question sufficient to validate the search. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Stops for questioning at permanent immigration checkpoints may be made in the absence of a warrant or any individualized suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Federal circuit courts have also determined that no greater justification is required to stop a person who has once passed through a customs inspection area but who is temporally and physically in proximity to the inspection area. *United States v. Nieves*, 609 F.2d 642 (2nd Cir. 1979); *United States v. Wardlaw*, 576 F.2d 932 (1st Cir. 1978); *United States v. Palmer*, 575 F.2d 721 (9th Cir. 1978); *United States v. Brown*, 499 F.2d 829 (7th Cir.), *cert. denied*, 419 U.S. 1047 (1974); *United States v. Maggard*, 451 F.2d 502 (5th Cir.), *cert. denied*, 405

U.S. 1045 (1972); *United States v. Mejias*, 452 F.2d 1190 (9th Cir. 1971).

In *Maggard* the Fifth Circuit held, as a valid permanent checkpoint stop, the stop of a vehicle two miles from and a few minutes after it had left a permanent checkpoint. The vehicle had been allowed through the checkpoint after a cursory examination. As it passed through the checkpoint, the low ride of the vehicle led the border patrol officers to believe that illegal aliens were in the vehicle. They pursued and stopped the vehicle. The Fifth Circuit held that a person is not "immune from further examination by customs agents merely because he may momentarily escape and pass safely through the first customs check." *Maggard, supra,* at 504.

Pursuant to the reasoning of the federal circuit courts, the stop of Petitioner's vehicle three to ten miles from the permanent checkpoint which he had gone through five minutes before was a proper checkpoint stop requiring no warrant or reasonable suspicion.

There was also sufficient justification to stop the vehicle under the roving patrol standard for immigration checks. This stop must be justified by reasonable suspicion that the vehicle contains illegal aliens. *Brignoni-Ponce, supra.*

> In reviewing the factors that led the agents to stop and question [Petitioner], it is important to recall that a trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." (Citation omitted). . . . "In all situations the officer is entitled to assess the facts in light of his experience." (Citation omitted).

United States v. Mendenhall, 446 U.S. 544, 564 (1980) (Opinion of Powell, J.).

The collective observations of Agents Ramirez and Jones assessed in light of their experience as border patrol agents at the checkpoint established reasonable suspicion to believe that the Petitioner's vehicle contained illegal aliens. The driver of the vehicle was evasive as he drove through the checkpoint. The occupants appeared to be of Latin descent. The vehicle had temporary Florida license plates which based on the Agents' combined 19-year experience indicated that illegal aliens were likely to be in the vehicle.

In light of the propriety of the stop of Petitioner's vehicle, Petitioner's voluntary consent was sufficient to validate the search. *Schneckloth, supra.*

C. The Case Is Factually Distinguishable From This Court's Decisions on the Issue of Illegal Arrests and Their Fruits.

In *Wong Sun v. United States,* 371 U.S. 471 (1963), the Court set forth the principles for determining whether statements and other evidence should be excluded as the fruits of an illegal arrest or search. The Court announced that the issue should be resolved by determining "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun, supra* at 488, quoting Maguire, Evidence of Guilt, 221 (1959). The *Wong Sun* principles have since been consistently and only applied by the Court in cases where the illegal detention was a formal arrest or was tantamount to an arrest and the objected-to evidence was obtained by that illegality. *Florida v. Royer,* 460 U.S. 491 (1983); *Taylor v. Alabama,* 457 U.S. 687 (1982); *Dunaway v. New York,* 442 U.S. 200 (1979); *Brown v. Illinois,* 422 U.S. 590 (1975). *See also Hayes v. Florida,* __U.S.__, 105 S.Ct. 1643 (1985); *Davis v. Mississippi,* 394 U.S. 721 (1969).

Critical to the Court's determination that a detention was tantamount to an arrest was the fact of the defendant's involuntary transportation by officers to a police interrogation room for questioning. *Royer, supra; Dunaway, supra. See also Hayes, supra; Davis, supra.* In *Florida v. Royer,* upon which Petitioner relies heavily, relevant factors to this determination also were Royer's confinement in a small interrogation room – a large closet – equipped with a desk and two chairs, with officers who told him they suspected he was carrying narcotics. The officers retrieved his luggage without his consent. They did not tell Royer until the encounter was relocated to the small room of their interest in the contents of his luggage. They had his ticket and identification and never informed him he was free to leave. The officers would have restrained Royer if he had attempted to leave. Royer was verbally unresponsive to the officers' request to accompany them and to the search of one of his suitcases.

This case is unlike *Wong Sun* and its progeny. Petitioner was not formally arrested until after the cocaine was discovered. Nor was he detained under circumstances tantamount to an arrest when he gave his consents to search his vehicle for drugs.

Petitioner's initial consent was given prior to the relocation of the encounter with the agents and under circumstances minimally intrusive on his Fourth Amendment interests.[1] *See United States v. Place,* 462 U.S. 696 (1983); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975). He gave this consent where his vehicle was stopped on the highway for an immigration check of its occupants. The agents limited the stop to

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[1] Although the court of appeals determined that Petitioner's vehicle was improperly stopped, it did not determine that the agents' conduct after the stop exceeded what would have been permissible in conducting an immigration check.

matters within the scope of an immigration check, i.e., examination of immigration papers and the driver's license, and with the driver's consent, examination of the trunk for hidden persons. *See Martinez-Fuerte, supra; Brignoni-Ponce, supra.*

By his own testimony, Petitioner voluntarily accompanied the agents "in the spirit of apparent cooperation" to the checkpoint for a search of his vehicle for drugs. *See United States v. Mendenhall,* 446 U.S. 544, 553 (1980) (Opinion of Stewart, J.). The agents told Petitioner and his brother of the recurring problem of drugs being secreted in cars being sold in Florida, without their buyers' knowledge. Agent Ramirez asked them whether they had any reservations about returning to the checkpoint to search the car for drugs. Petitioner testified that he understood what was asked of him, had no objection to returning to the checkpoint, and was not forced to go back against his will. His brother likewise had no reservations, had absolutely no objection to returning to the checkpoint, and voluntarily returned.

The consensual move of the encounter with the agents to the checkpoint was not thereafter transformed into circumstances of an arrest. Petitioner and his companions were taken to a trailer and not an interrogation room. They were not restrained in any way. The agents did not retrieve Petitioner's vehicle or its contents without his consent. Rather, they first obtained Petitioner's written consent to search the vehicle and later obtained his consent to take the tire apart. Petitioner had no reservations about signing the consent form. He was left alone with his brother and wife while the agents searched the vehicle, thereby having time for reflection and consultation. Upon the agents return to him with the spare tire, he gave his consent to take the tire apart, stating, "Sure, no problem; go right ahead."

Petitioner offered no objective basis for a belief that he was not free to leave. His only basis for such a belief—police/citizen

encounters in Cuba—was subjective and unrelated to the circumstances of his encounter with the agents. His brother's only basis for a similar belief was likewise subjective and unrelated to the circumstances of the encounter. There was no testimony that the agents intended to restrain them. There was no testimony that the agents took advantage of Petitioner's Cuban status or his unawareness of his right to refuse consent. The facts are clear and unequivocal therefore that Petitioner's consent to accompany the agents was voluntary and not acquiescence to an assertion of lawful authority.

What began as an improper stop (according to the appellate court) proceeded to a minimally intrusive detention to check on immigration status. It next proceeded to a consensual police/citizen encounter. Petition gave voluntary consents to search his vehicle and spare tire under those circumstances and not those tantamount to an arrest. The principles of *Wong Sun* and its progeny, applicable only to evidence obtained after an illegal arrest, consequently are inapposite. There is no conflict between this case and the decisions of the Court.

If the illegal detention of Petitioner were sufficient to invoke the principles of *Wong Sun*, the evidence was nevertheless not obtained by exploitation of the illegality. Three factors are relevant to the inquiry: the "temporal proximity of the arrest and [the evidence], the presence of intervening circumstances . . . and, particularly, the purpose and flagrancy of the official misconduct." *Brown, supra* at 603-604. Focus on *Royer* is again appropriate in light of Petitioner's assertion of the similarity of the two cases.

The preceding discussion of this case and *Royer* demonstrates that the two differ materially on the most important factor to the present inquiry: the purpose and flagrancy of the official misconduct. Royer's detention was an arrest on suspicion of possession of drugs. The detention was both purposeful and flagrantly executed. *Royer, supra* at 496, 502-503.

On the other hand, Petitioner was only detained on the highway and that detention was for immigration verification. The record shows no improper purpose. Belief in the propriety of the stop was reasonable. *See, e.g., Brignoni-Ponce, supra; Palmer, supra; Maggard, supra;* Section B, *supra.* The action taken by the agents during the detention was limited to matters within the scope of an immigration check. In short, the highway detention was not exploited to gain evidence of drugs.

Because this case is factually distinguishable from *Wong Sun* and its progeny, no illegal arrest and no exploitation, the Court should deny the petition.

CONCLUSION

Respondent, State of New Mexico, respectfully requests the Court to deny the writ of certiorari. The exercise of the Court's discretion in favor of the question raised by the petition would be imprudent where the case has no precedential value, the result will remain unchanged upon review of the case by the Court, and the case is factually distinguishable from the Court's decisions.

Respectfully submitted,

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